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## International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship

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# INTERNATIONAL LAW AND INTERNATIONAL RELATIONS THEORY: A NEW GENERATION OF INTERDISCIPLINARY SCHOLARSHIP

By Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood\*

## INTRODUCTION

Nine years ago, Kenneth Abbott published an article exhorting international lawyers to read and master regime theory, arguing that it had multiple uses for the study of international law.<sup>1</sup> He went as far as to call for a "joint discipline" that would bridge the gap between international relations theory (IR) and international law (IL). Several years later, one of us followed suit with an article mapping the history of the two fields and setting forth an agenda for joint research.<sup>2</sup> Since then, political scientists and international lawyers have been reading and drawing on one another's work with increasing frequency and for a wide range of purposes.<sup>3</sup> Explicitly interdisciplinary articles have won the Francis Deák Prize, awarded for the best work by a younger scholar in this *Journal*, for the past two years running;<sup>4</sup> the publication of an interdisciplinary analysis of treaty law in the *Harvard International Law Journal* prompted a lively exchange on the need to pay attention to legal as well as political details;<sup>5</sup> and the Hague Academy of International Law has scheduled a short course on international law and international relations for its millennial lectures in the year 2000. Further, the American Society of International Law and the Academic Council on the United Nations System sponsor joint summer workshops explicitly designed to bring young IR and IL scholars together to explore the overlap between their disciplines.

On the IR side of the ledger, the "I word" is no longer taboo.<sup>6</sup> The institutionalism research agenda has risen in prominence, dictating dissertation topics and dominating

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<sup>1</sup> See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335 (1989).

<sup>2</sup> Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 *AJIL* 205 (1993).

<sup>3</sup> One measure of this trend, albeit a crude and mechanical one, is a marked increase in cross-citations. A LEXIS/NEXIS search conducted in December 1997 revealed 41 citations to ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984), in the legal literature. Thirty-nine of these citations appear in articles published after 1993, even though *After Hegemony* was published in 1984. Similarly, the term "regime theory" has been used 44 times since 1994, although only 6 times between 1990 and 1994; "Institutionalism" has been referred to 40 times after 1994, as compared to 6 between 1990 and 1994. Abbott's *Prospectus*, published in 1989, has been cited 91 times, 34 since 1995; Slaughter's *Dual Agenda*, published in 1993, has been cited 56 times, 38 since 1995 and 29 since 1996. The term "epistemic communities," an important concept for some segments of the IR community, has been cited 30 times in the legal literature since 1990, 23 of them since 1993. Even political Realism, in its classical Thucydidean variant, is experiencing a modest revival, with 13 references since 1990, 10 of which were after 1994.

<sup>4</sup> Jutta Brunnée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 *AJIL* 26 (1997); Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 *AJIL* 384 (1996).

<sup>5</sup> John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 *HARV. INT'L L.J.* 139 (1996); Michael Byers, *Taking the Law out of International Law: A Critique of the Iterative Perspective*, 38 *HARV. INT'L L.J.* 201 (1997).

<sup>6</sup> ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 2 n.3 (1995).

important journals. A team of international relations scholars specializing in law has published an anthology of readings designed to set forth IR and IL approaches to international rules.<sup>7</sup> And Robert Keohane, the international relations scholar most responsible for the rise of Institutionalism, gave the 1996 Sherrill Lecture at Yale Law School on "International Relations and International Law: Two Optics."<sup>8</sup>

The purpose of this article is to take stock of this growing interdisciplinary literature, much of which is collected in the bibliography. Our stock taking, however, is intended to be more than mere inventory. It is designed both to identify avenues that have been explored and to canvass promising new directions of joint research. We begin from the premise that it is time to move beyond canonical narratives of how the disciplines evolved, both separately and in conjunction with each other. These narratives are valuable both as intellectual history, providing necessary context for current debates, and as bulwarks against ad hoc borrowing of terms and concepts. But it is time to move on.

It is equally important to move beyond the presentation and self-presentation of one discipline to the other. Virtually all of the recent efforts to urge international lawyers to engage in more interdisciplinary scholarship have looked to different paradigms or schools of IR theory that political scientists themselves use in surveying their field. Kenneth Abbott emphasized the value of regime theory, now generally referred to as Institutionalism,<sup>9</sup> for international lawyers; Anne-Marie Slaughter reviewed Neo-Realism and Institutionalism but focused particularly on the uses of liberal theory;<sup>10</sup> Harold Koh and Friedrich Kratochwil have explored the value of constructivist approaches.<sup>11</sup> On the IR side, a spate of recent anthologies and special journal issues accept and entrench these divisions, reviewing Realism,<sup>12</sup> pitting Neo-Realism against Neo-Liberalism,<sup>13</sup> denouncing the "false promise" of Institutionalism,<sup>14</sup> clarifying the sources and common themes of Liberalism,<sup>15</sup> and reviewing "new thinking" in each of these categories.<sup>16</sup>

This essay avoids further restatement of theoretical paradigms and instead examines the ways that international legal scholars are actually using IR theory and empirical research in their scholarship. What analytical tasks are international lawyers asking IR theory to perform? Can we classify these diverse explorations and uses of IR theory in theoretically or practically fruitful ways? Moreover, do legal scholars conceive of interdisciplinarity as a one- or two-way street? Are they borrowing methods or concepts from IR to fill perceived inadequacies in legal analysis? Or are they attempting to engage IR theory in a dialogue that aims at challenging or developing existing ideas and techniques

<sup>7</sup> INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (Robert J. Beck, Anthony C. Arend & Robert D. Vander Lugt eds., 1996) [hereinafter INTERNATIONAL RULES].

<sup>8</sup> Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997).

<sup>9</sup> See Abbott, *supra* note 1.

<sup>10</sup> See Slaughter, *supra* note 2; see also Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

<sup>11</sup> See Harold H. Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997) [hereinafter Koh, *Why Obey?*]; Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) [hereinafter Koh, *Transnational Process*]. FRIEDRICH KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989), prefigured much of the current constructivist work on international law.

<sup>12</sup> THE PERILS OF ANARCHY: CONTEMPORARY REALISM AND INTERNATIONAL SECURITY (Michael E. Brown, Sean M. Lynn-Jones & Steven E. Miller eds., 1995).

<sup>13</sup> NEO-REALISM AND NEO-LIBERALISM: THE CONTEMPORARY DEBATE (David A. Baldwin ed., 1993).

<sup>14</sup> See John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY, Winter 1994-95, at 5 (arguing that institutions cannot prevent war by changing state behavior); *Promises, Promises: Can Institutions Deliver?* INT'L SECURITY, Summer 1995, at 39 (responses to Mearsheimer by Robert Keohane, Lisa Martin, Charles Kupchan, Clifford Kupchan, John Ruggie & Alexander Wendt); John J. Mearsheimer, *A Realist Reply*, *id.* at 82.

<sup>15</sup> See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

<sup>16</sup> NEW THINKING IN INTERNATIONAL RELATIONS THEORY (Michael W. Doyle & G. John Ikenberry eds., 1997).

on questions of common concern to members of both disciplines? Or both? Finally, what does the rapidly expanding corpus of recent IR/IL scholarship suggest about directions for future research?

We begin by looking at how international lawyers have brought IR theory to bear on the analysis of international law and institutions. We identify three ways that lawyers are using materials and insights from IR theory: to diagnose substantive problems and frame better legal solutions; to explain the structure or function of particular international legal rules or institutions; and to reconceptualize or reframe particular institutions or international law generally. Some of these projects have yielded more fruitful and promising results than others, but in all of them international legal scholars are revealed less as passive consumers using IR theory to reinvigorate their own discipline than as active theorists and problem solvers in their own right, using whatever analytical tools best suit their purposes.

In the same vein, we examine a variety of ways that international legal scholars have reasserted or reaffirmed the value of their own discipline as an equal partner in interdisciplinary studies. To the extent that some proponents of interdisciplinary scholarship saw IL as a patient and IR as the cure, the patient is alive and kicking (or, to stretch the metaphor, is no longer a patient but a professional colleague). Specifically, many lawyers (and a number of political scientists) are newly insisting on the importance of law as an explanatory factor in the analysis of state behavior in the international system. They are also actively seeking to explain the precise mechanisms or pathways by which legal rules shape not only political outcomes but also actors and social structures. Finally, legal scholars chide political scientists for focusing too much on structures and not enough on process.

We next develop an interdisciplinary research agenda. We identify three themes around which IL and IR scholars are converging: international governance, social construction and liberal agency. This focus on substantive themes cross-cuts established paradigms and self-defined disciplinary boundaries and leads to six clusters of research questions on which a collaborative research agenda might be built. These six clusters fall under the headings of regime design, process design, discourse on the basis of shared norms, transformation of the constitutive structures of international affairs, government networks and embedded institutionalism.

Finally, an important caveat is in order. Any attempt to map a field, however loosely, is bound to be both exclusionary and subjective. Many scholars who may consider themselves to be drawing on or speaking to both disciplines, or at least addressing problems central to both disciplines, may be surprised to find that their work is not reviewed here. Such omissions are likely to be particularly noticeable with respect to scholarship produced before the mid-1980s or more recent work that eschews the dominant vocabulary of contemporary U.S. IR theory.<sup>17</sup> Within these limits, then, this essay reviews recent literature that explicitly uses a number of contemporary theoretical approaches in IR to address problems of interest to both IR and IL.<sup>18</sup>

Part I reflects briefly on some of the reasons for the most recent flowering of IR/IL scholarship. Part II reviews how international lawyers are drawing on international relations scholarship. Part III explores the ways international lawyers are reaffirming the importance of law in these interdisciplinary projects. Part IV sets forth an integrated research agenda.

<sup>17</sup> This vocabulary signals self-conscious use of common theoretical frameworks, facilitating active or passive collaboration on issues of interest to both disciplines. At the same time, however, such collaboration will not be possible or desirable on many issues that each discipline is likely to claim as its own.

<sup>18</sup> We are indebted to an anonymous reviewer for a thoughtful discussion of the broader spectrum of interdisciplinary work. Any remaining errors of omission or commission are our own.

# I. EXPLAINING THE INTEREST IN INTERDISCIPLINARY SCHOLARSHIP

Our first task is to explain the increased interest in interdisciplinary collaboration among members of both disciplines. Why are international lawyers turning in increasing numbers to IR for theoretical models, methodological tools, policy prescriptions or empirical data? And why are an increasing number of IR theorists again considering international law and formal international organizations worthy of serious attention?

These steps toward interdisciplinary collaboration may be understood on several levels. We briefly explore two types of explanation. At one level, the interest in interdisciplinary collaboration may be understood as the result of responses by members of each discipline to developments in the external environment they seek to explain and shape. At another level, the interest in interdisciplinary scholarship may be understood in terms of intellectual dynamics internal to each discipline.

First, IR and IL scholars seem increasingly to see the same world outside their office windows. One of the things they see is a proliferation of formal institutions for international cooperation. Governments conduct a large and growing proportion of their foreign affairs, in an ever-increasing range of issue-areas, through a wide variety of formal agreements and organizations.<sup>19</sup> In response, IR theorists are much more interested in the form of international institutions, or rather, the difference that form makes.<sup>20</sup> Further, much institutionalized cooperation has taken an increasingly "legalized," "judicialized" or constitutional form. The most striking story in this regard remains "the community of law" constructed by the European Court of Justice together with national courts of the European member states,<sup>21</sup> but various other international regimes, from the World Trade Organization (WTO) to the North American Free Trade Agreement (NAFTA), to the World Bank, depend increasingly on legal dispute mechanisms.<sup>22</sup>

Second, both IR and IL scholars are witnessing a competing trend in international life, signaled by the rise of a group of phenomena most often explained in terms of "globalization," "transnationalism" or the "new medievalism." These include the emergence and increasing importance of substate and nonstate actors, increasing international economic and political interdependence, the perceived transformation or disintegration of state sovereignty, the ascendancy of difficult "global" issues that require coordinated responses, and the continuing financial and administrative crises of the United Nations Organization. In this increasingly complicated environment, students of international order are embracing international "governance" as an alternative to

<sup>19</sup> But see Cheryl Shanks, Harold K. Jacobson & Jeffrey H. Kaplan, *Inertia and Change in the Constellation of International Governmental Organizations, 1981–1992*, 50 INT'L ORG. 593 (1996) (arguing that, within the general trend of increasing international cooperation, formal organizations have stopped proliferating).

<sup>20</sup> See, e.g., Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998); MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM (John G. Ruggie ed., 1993); Charles Lipson, *Why Are Some International Agreements Informal?* 45 INT'L ORG. 495 (1991); Friedrich Kratochwil & John G. Ruggie, *International Organization: A State of the Art on the Art of the State*, 40 INT'L ORG. 753 (1986).

<sup>21</sup> The classic account remains Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991). For a review of much of the legal and political science literature on the ECJ, and a definition of the elements of a community of law, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 290–93, 366–70 (1997).

<sup>22</sup> The transformation of the GATT dispute resolution process from one that relies principally on political negotiation to a much more formal legal process in which the disputants present claims before a binding third-party tribunal has focused attention on judicialization as a wider phenomenon. See, e.g., Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, in IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE 9 (Michael M. Hart & Debra P. Steger eds., 1992); John H. Jackson, *The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections*, in TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS, ESSAYS IN HONOUR OF HENRY G. SCHERMERS 149 (Niels Blokker & Sam Muller eds., 1994); Alec Stone Sweet, *Judicialization and the Construction of Governance*, J. COMP. POL. STUD. (forthcoming April 1999) (on file with authors); see also David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163 (1997).

international "government," the traditional liberal internationalist ideal of formal international institutions displacing domestic sovereigns in specific issue-areas. International governance is understood as the formal and informal bundles of rules, roles and relationships that define and regulate the social practices of state and nonstate actors in international affairs<sup>23</sup>—an idea whose resemblance to IR definitions of international regimes or institutions is no coincidence.<sup>24</sup>

Third, emphasizing governance over government tends to highlight the advantages of "soft law" over "hard law." Supranational institutions may not always be able to promulgate and enforce law, but they can and do frequently generate norms that are disseminated by nongovernmental organizations (NGOs) to pressure domestic political actors. Many of these NGOs are the international analogues of U.S. public interest groups, skilled in the ways of using law to promote social change, however slowly and imperfectly.<sup>25</sup>

Finally, the fascination with compliance continues. Louis Henkin's celebrated observation that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"<sup>26</sup> continues to tantalize. Political scientists and international lawyers who have responded most recently to the challenge of demonstrating and explaining this claim include Oran Young, Thomas Franck, Abram and Antonia Chayes, and Edith Brown Weiss and Harold Jacobson.<sup>27</sup> Chayes and Chayes develop a "managerial theory" of compliance that draws explicitly on legal theory deemphasizing punitive enforcement of law and on IR theory highlighting the functional dimensions of regimes in facilitating cooperation.<sup>28</sup> Harold Koh and Beth Simmons are independently working on book-length studies of "why nations obey."<sup>29</sup> Starting from the vantage point of their respective disciplines, each is self-consciously using an interdisciplinary approach.

The new enthusiasm for interdisciplinary collaboration may also be understood partially as the product of intellectual dynamics within each discipline. The turn to international relations theory in international law must be situated within a more general interdisciplinary trend, generating a host of "law and . . ." initiatives. For some, the turn to social science, with its parsimonious causal theories and emphasis on observed behavior, can be understood as a response to law's perceived "reality deficit."<sup>30</sup> To paraphrase Annalise Riles, law is incomplete and turns to social science for completion in the form of a connection to concrete social practices.<sup>31</sup> From this perspective, interna-

<sup>23</sup> See, e.g., Benedict Kingsbury, *The Tuna-Dolphin Controversy, The World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENVTL. L. 1, 27 (1994); COMMISSION ON GLOBAL GOVERNANCE: OUR GLOBAL NEIGHBORHOOD (1995).

<sup>24</sup> Much of the energy behind the recent turn to "governance" in public international law has come from IR theory. See, e.g., ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY (1994) [hereinafter YOUNG, INTERNATIONAL GOVERNANCE]; Oran R. Young, *Introduction: The Effectiveness of International Governance Systems*, in GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL GOVERNANCE 1 (Oran Young et al. eds., 1996); GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

<sup>25</sup> See Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

<sup>26</sup> LOUIS HENKIN, HOW NATIONS BEHAVE 42 (1968).

<sup>27</sup> ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS (1979); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); CHAYES & CHAYES, *supra* note 6; ENGAGING COUNTRIES: STRENGTHENING ENVIRONMENTAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 1997).

<sup>28</sup> CHAYES & CHAYES, *supra* note 6.

<sup>29</sup> See Koh, *Why Obey?* *supra* note 11; Beth Simmons, Capacity, Commitment and Compliance: International Law and the Settlement of Territorial Disputes, paper delivered at Conference on Domestic Politics and International Law, St. Helena, Cal. (June 4–7, 1997) (on file with authors).

<sup>30</sup> See Brian Z. Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 OXFORD J. LEGAL STUD. 501, 512 (1995).

<sup>31</sup> Annalise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597, 633–36, 649–50; see also Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 L. & SOC'Y REV. 727, 743, 745 (1989).

tional law is particularly susceptible to the siren call of social science, as it struggles perpetually with suspicions of its own irrelevance.<sup>32</sup>

For others, the integration of IR and IL scholarship is an affirmation of IL as both intellectual and practical enterprise. It is the natural corollary of the indivisibility of law and politics. Proponents of this approach equate the relationship between IL and IR with the relationship between constitutional law and comparative politics, insisting that normative efforts to induce or change behavior rest on explicitly articulated assumptions about the causes or nature of that behavior.<sup>33</sup> These two approaches are helping to fuel a lively intradisciplinary debate within IL.

On the IR side, we similarly can sketch the developments that led to the current revival of interest in formal institutions and international law. First, as noted in the introduction, Institutionalism has emerged as the dominant theoretic paradigm in the North American IR academy. Many institutionalists and realists have converged upon assumptions and questions comprising a "rationalist" research program.<sup>34</sup> Their common commitment to identifying and explaining the conditions for cooperation among rational egoists, whatever form that cooperation might take, has overshadowed realism's traditional hostility to international law. Institutional IR theorists have thus begun to give international law and formal organizations serious attention.<sup>35</sup> Moreover, IR scholars are collaborating directly with international lawyers,<sup>36</sup> and some have joined in calling for a joint research agenda.<sup>37</sup>

Second, significant segments of the IR academy, particularly the so-called English school<sup>38</sup> and U.S. "international organizations" specialists,<sup>39</sup> have always accorded international law and organizations a central place in their research and scholarship. These traditions have enjoyed something of a revival in the American IR academy in recent years as interest in formal institutions has increased.

<sup>32</sup> See Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 133, 142 (Karl W. Deutsch & Stanley Hoffmann eds., 1968); see also THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 25 (1995).

<sup>33</sup> See Slaughter, *supra* note 10.

<sup>34</sup> Rationalists share, at a minimum, a commitment to positivist social scientific research methods and the assumption that states are rational, unitary actors pursuing exogenously given preferences in an anarchic (self-help) world. See, e.g., Robert O. Keohane, *International Institutions: Two Approaches*, 2 *INT'L STUD. Q.* 379 (1989); Ole Wæver, *Figures of International Thought: Introducing Persons Instead of Paradigms*, in *THE FUTURE OF INTERNATIONAL RELATIONS: MASTERS IN THE MAKING* 1, 19–21 (Iver B. Neumann & Ole Wæver eds., 1997) [hereinafter *FUTURE OF IR*].

<sup>35</sup> See, e.g., *INTERNATIONAL RULES*, *supra* note 7; RONALD B. MITCHELL, *INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE* (1994); ANTHONY C. AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* (1993); Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 *INT'L ORG.* 541 (1996); see also sources cited *supra* note 20.

<sup>36</sup> See, e.g., Abbott & Snidal, *supra* note 20. Judith Goldstein, Miles Kahler, Robert Keohane and Anne-Marie Slaughter have convened a group of political scientists and international lawyers to study the phenomenon of "legalization" of international regimes. Harold Koh is editing a volume of essays by international relations scholars and international lawyers that includes contrasting approaches to international human rights. Finally, Michael Byers organized the 1998 annual meeting of the British branch of the International Law Association around the theme of international law and politics, explicitly featuring papers from both disciplines on subjects ranging from the sources of international law to the regulation of the international economy. These papers will also be published as an interdisciplinary edited volume.

<sup>37</sup> See, e.g., Keohane, *supra* note 8; YOUNG, *INTERNATIONAL GOVERNANCE*, *supra* note 24. But see Oran Young, Remarks, 86 *ASIL PROC.* 172, 173–75 (1992) (pointing out the obstacles to interdisciplinary research).

<sup>38</sup> See, e.g., HEDLEY BULL, *THE ANARCHICAL SOCIETY* (1977); Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 49 (Volker Rittberger & Peter Mayer eds., 1993) (discussing the English school's relation to international law and regime theory); Alexander Wendt & Raymond Duvall, *Institutions and International Order*, in *GLOBAL CHANGES AND THEORETICAL CHALLENGES* 51 (Ernst-Otto Czempiel & James S. Rosenau eds., 1989) (discussing the relation between Constructivism and the English school).

<sup>39</sup> Many international organizations specialists are among the relatively small group of IR scholars who "are fluent in both languages" of law and IR, as Oran Young puts it. Young, *supra* note 37.

Third, the rise of Constructivism over the past decade has challenged the rationalist account of norms. Constructivists insist that actors' identities and interests are not exogenously given but are constituted through interaction on the basis of shared norms such as international law, sovereignty and anarchy.<sup>40</sup> Some constructivists have been studying legal institutions and practices for years;<sup>41</sup> others are following suit.<sup>42</sup>

Finally, liberal IR theory has reclaimed lost ground, reemerging not as Wilsonian idealism but as a positivist paradigm based on the centrality of state-society relations.<sup>43</sup> Liberals distinguish among states on the basis of domestic regime type, creating the possibility of differential analyses of the creation of and compliance with international law. Key factors include the role of domestic rule-of-law norms, separation of powers and strong domestic courts. Liberal IR theorists are also exploring the likelihood of sustained cooperation among liberal democracies and the potential for more equal relations between small states and big states within alliances and other institutions limited to liberal democracies.<sup>44</sup> The next wave of liberal IR scholarship is likely to decouple liberalism from democracy, attempting to separate the effects of checks on government power, including a strong and independent judiciary, from the effects of representative government.<sup>45</sup> The results will directly implicate the importance of domestic legal structures and the relationship between domestic and international law.

Thus, the new generation of interdisciplinary scholarship reflects both perceived changes in world politics and diverse intradisciplinary dynamics. We now examine how international legal scholars are drawing on IR theory in this latest round of interdisciplinary work.

## II. HOW INTERNATIONAL LAWYERS ARE USING INTERNATIONAL RELATIONS THEORY

The recent enthusiasm for IR theory is based partly, if not principally, on the claim that an understanding of the sister discipline will enrich international lawyers' practical and intellectual work, from doctrinal analysis and policy prescriptions to international legal theory. The story here, however, is richer and more complex than one in which traditionally positivist lawyers have become more interested in "theorizing" as opposed to "describing," "reporting" or "narrating." Instead, IL scholars have drawn on IR theory in a variety of ways. This section identifies three such ways: (1) to diagnose international policy problems and to formulate solutions to them; (2) to explain the function and structure of particular international legal institutions; and (3) to examine and reconceptualize particular institutions or international law generally. Two preliminary observations are necessary regarding these categories. First, we are less interested

<sup>40</sup> See, e.g., Alexander Wendt, *Anarchy Is What States Make of It*, 46 INT'L ORG. 391 (1992); JOHN G. RUGGIE, *CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION* (1998).

<sup>41</sup> See, e.g., KRATOCHWIL, *supra* note 11; Martha Finnemore, *International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy*, 47 INT'L ORG. 565 (1993); NICHOLAS G. ONUF, *WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS* (1989); Kratochwil & Ruggie, *supra* note 20.

<sup>42</sup> See Christian Reus-Smit, *The Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 INT'L ORG. 555 (1997); Albert S. Yee, *The Causal Effects of Ideas on Policies*, 50 INT'L ORG. 69 (1996); Audie Klotz, *Norms Reconstituting Interests*, 49 INT'L ORG. 451 (1995).

<sup>43</sup> See Moravcsik, *supra* note 15; Daniel Deudney, *Binding Powers, Bound States: The Logica and Geopolitics of Negarchy*, paper presented at the International Studies Association, Washington, D.C. (Mar. 28–Apr. 2, 1994); Mark W. Zacher & Richard A. Matthew, *Liberal International Theory: Common Threads, Divergent Strands*, in *CONTOVERSIES IN INTERNATIONAL RELATIONS THEORY* 107 (Charles W. Kegley, Jr., ed., 1995); THOMAS RISSE-KAPPEN, *BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS* (1995); THOMAS RISSE-KAPPEN, *COOPERATION AMONG DEMOCRACIES: THE EUROPEAN INFLUENCE ON U.S. FOREIGN POLICY* (1995) [hereinafter RISSE-KAPPEN, *COOPERATION*].

<sup>44</sup> See RISSE-KAPPEN, *COOPERATION*, *supra* note 43.

<sup>45</sup> See MICHAEL W. DOYLE, *WAYS OF WAR AND PEACE* (1997); Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov./Dec. 1997, at 22.



in the particular paradigms or schools of IR theory lawyers are invoking than in how they are making use of these tools and insights in their work. Second, the categories overlap in certain respects, and some writers' work fits into more than one category. We chose them for their heuristic value in isolating uses of IR theory.

As should be expected of any such venture, the interdisciplinary corpus reflects a number of false starts and failed attempts. At its best, the new interdisciplinary work deepens our understanding of the causes of, and potential legal responses to, international problems and sharpens our understanding of what particular institutional arrangements do. At its worst, it simply restates what has already been done, misinterprets the core propositions of IR work, or identifies vague similarities between IL and IR. Therefore, in assessing the work that has been done, we highlight the benefits and the risks of each of these approaches, both to illustrate the value of further interdisciplinary work and to help future endeavors avoid potential pitfalls.

### *Using IR Theory to Diagnose and Resolve International Problems*

The first category of interdisciplinary work is essentially "problem driven." International lawyers draw on theories and concepts in IR theory to diagnose or reframe a variety of international problems and to formulate policy solutions. They seek to specify the nature and causes of particular international problems and to identify possible institutional responses. Collective goods, free-rider incentives, market failures, and game-theoretic models such as the Prisoner's Dilemma typically provide the theoretical framework for diagnostic and prescriptive work of this kind, although some scholars have reached beyond these economics-based tools to other models or metaphors in the IR literature.

Trade and environmental problems have been a fertile source for work in this area. Eyal Benvenisti, for example, diagnoses freshwater resource management as a collective-action problem, draws on the IR literature to specify principles for overcoming collective-action problems, and then evaluates alternative procedural and substantive options for regulating water resource management at the international level in light of these principles.<sup>46</sup> Similarly, Robert Schmidt employs Robert Putnam's theory of two-level games to explain the impasse in U.S.-Canadian Pacific salmon negotiations and to propose a unilateral strategy the United States might pursue to bring about agreement.<sup>47</sup>

International legal scholars have also invoked IR theory to diagnose and resolve problems of ethnic conflict and international security. David Wippman, for example, draws on Arend Lijphart's theory of consociationalism to examine potential legal solutions to ethnic conflict and potential international legal objections to such arrangements.<sup>48</sup> International legal scholars have also applied IR theory as a diagnostic and policy-prescriptive tool to the problems of Israeli-Palestinian relations, international terrorism, and a range of other international issues from antitrust enforcement to trade wars.<sup>49</sup>

<sup>46</sup> Benvenisti, *supra* note 4.

<sup>47</sup> Robert J. Schmidt, *International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission*, 26 NW. ENVTL. L. REV. 95 (1996); see also Miguel Montañá-Mora, *International Law and International Relations Cheek to Cheek: An International Law/International Relations Perspective on the U.S./EC Agricultural Export Subsidies Dispute*, 19 N.C.J. INT'L L. & COM. REG. 1 (1993) (seeking to use IR theory to explain the source of the U.S.-European Community agricultural export subsidies dispute during the Uruguay Round).

<sup>48</sup> See David Wippman, *Practical and Legal Constraints on Internal Power Sharing*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 211 (David Wippman ed., 1998).

<sup>49</sup> See generally Jonathan R. Macey, *Chicken Wars as a Prisoner's Dilemma: What's in a Game?* 64 NOTRE DAME L. REV. 447 (1989); Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925 (1996); Ayaz R. Shaikh, Note, *A Theoretic Approach to Transnational Terrorism*, 80 GEO. L.J. 2131 (1992); Moshe Hirsch, *The Future Negotiations over Jerusalem, Strategic Factors and Game Theory*, 45 CATH. U. L. REV. 699 (1996); William B. T. Mock, *Game Theory, Signaling,*

This use of IR theory is valuable because it provides lawyers with powerful theoretical and rhetorical tools to specify the nature and causes of substantive problems and the types of regulatory regimes appropriate to deal with them. It is increasingly clear that the characterization of the substantive problem has important implications for the appropriate form of regulatory response.<sup>50</sup> All interdisciplinary IR/IL work is based, explicitly or implicitly, on some model or diagnosis of the "world out there." By making these conceptual frameworks more explicit, scholarship in this first category makes it possible both to uncover commonalities among substantive problems that point the way to new or different solutions and to examine the underlying conceptual frameworks themselves.

This type of interdisciplinary project, however, is not without drawbacks. At the most basic level is a danger of borrowing models and metaphors from IR theory indiscriminately, particularly those—like the Prisoner's Dilemma—that evoke powerful images and are accessible to newcomers to IR literature. As long as the limitations of these models are appreciated, such borrowing can be a crucial source of innovation. However, theory can itself become a game—leading to what Robert Keohane has described as "model mania."<sup>51</sup> Even the most elaborate models are no substitute for solid empirical work, or, for lawyers, careful analysis of the operation of a particular law in economic, social and political context.

A second drawback to this use of IR is a tendency to overlook the fact that the provision of institutional responses to substantive policy problems may present the same sorts of collective-action challenges as the substantive problems themselves. Institutions that provide collective goods may be collective goods themselves, subject to the same difficulties of supply and maintenance as the underlying substantive benefits they are designed to provide.<sup>52</sup> This insight is a core contribution of the institutionalist research agenda: by problematizing institutions, it has specified the conditions under which international regimes are likely to emerge.

#### *Using IR Theory to Analyze Particular International Legal Institutions*

If the first category of IR/IL scholarship uses IR theory mainly to generate theoretical accounts of particular substantive problems, the thrust of the second category is to "reason forward from a theoretical understanding of particular issue areas . . . to richer explanations of the meaning and function of international agreements, procedures and institutions."<sup>53</sup> Unlike work in the first category, work in this category is less concerned with making policy recommendations or exploring solutions to particular policy problems; rather, it endeavors to catalogue and explain what particular international legal institutions *do* and why they are structured as they are. Kenneth Abbott pioneered this approach by examining, through the lens of rationalist regime theory, the functions

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and *International Legal Relations*, 26 GEO. WASH. J. INT'L L. & ECON. 33 (1992); Spencer W. Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 KAN. L. REV. 557 (1994).

<sup>50</sup> See, e.g., Hugh Ward, *Game Theory and the Politics of the Global Commons*, 37 J. CONFLICT RESOL. 203 (1993) (demonstrating that some global commons issues may be best analyzed as a Prisoner's Dilemma and others as a game of Chicken, and showing that different institutional responses are appropriate to each); Duncan Snidal, *Coordination vs. Prisoner's Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985) (predicting that agreements designed to deal with prisoners' dilemmas will differ from those designed to cope with coordination problems).

<sup>51</sup> Robert O. Keohane, *Studying Cooperation and Conflict: Intra-Rationalistic and Extra-Rationalistic Research Programs*, talk at a roundtable on conflict and cooperation, American Political Science Association annual meeting, San Francisco (Aug. 1996).

<sup>52</sup> Compare Benvenisti, *supra* note 4 (analyzing freshwater resources, but not the institutions that manage them, as collective goods) with Abbott, *supra* note 1, at 379–81 (arguing that both collective goods themselves and the legal regimes designed to provide them present collective-action dilemmas that can be analyzed in terms of IR theory).

<sup>53</sup> Kenneth W. Abbott, "Trust But Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1, 2 (1993).

performed by international trade law<sup>54</sup> and by the "assurance" and "verification" provisions of major arms control agreements.<sup>55</sup>

Others have followed suit. William Aceves explores the functions of particular provisions of the Comprehensive Test Ban Treaty, explaining how the provisions are consistent with the functions that institutionalists assert regimes perform.<sup>56</sup> Jamison Colburn relies on regime theory to explain several features of the 1995 UN agreement on straddling and highly migratory fish stocks.<sup>57</sup> David Fidler and Bruce Plotkin have engaged in a lively debate over how far the new International Health Regulations promulgated by the World Health Organization go toward performing the functions that Institutionalism asserts an effective regime should perform.<sup>58</sup> John Setear argues that the theory of iterated play, as applied to international politics by institutionalist scholars, offers the best explanation of the functions that the law of treaties performs, and the best explanation why the law of treaties is structured as it is.<sup>59</sup> In a subsequent article, Setear examines whether the law of treaties and the law of state responsibility are consistent with rationalist institutionalist predictions.<sup>60</sup> And, more recently, Abbott has teamed up with political scientist Duncan Snidal to explore the functions performed by formal international organizations.<sup>61</sup>

Legal scholars engaging IR in this way have reached beyond Institutionalism. Richard Steinberg, for example, uses realist IR theory to explain why environment-friendly rules are developing more quickly and thoroughly in the European Union and the NAFTA than in the WTO.<sup>62</sup> Following "realists like Stephen Krasner and Geoffrey Garrett, who hold that powerful states set the rules of international regimes,"<sup>63</sup> Steinberg argues that the varying scope and rate of development of trade-environment rules within these organizations are attributable to the relative differences in power between the richer, greener states and the poorer, browner states among their members.

This use of IR is valuable to the extent that it sharpens our understanding of the function of particular institutional arrangements. It represents an improvement over descriptive projects that provide much information about how institutions are structured but fail to analyze the functions they perform.<sup>64</sup> A more precise understanding of the functions performed by various treaty provisions and institutional features can

<sup>54</sup> See Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501 (1985).

<sup>55</sup> See Abbott, *supra* note 53.

<sup>56</sup> William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U.J. INT'L L. & POL'Y 227 (1997).

<sup>57</sup> Jamison E. Colburn, Note, *Turbot Wars: Straddling Stocks, Regime Theory, and a New U.N. Agreement*, 6 FLA. ST. U.J. TRANSNAT'L L. & POL'Y 323 (1997).

<sup>58</sup> David Fidler, *Mission Impossible? International Law and Infectious Diseases*, 10 TEMP. INT'L & COMP. L.J. 493 (1996); Bruce Plotkin, *Mission Possible: The Future of the International Health Regulations*, *id.* at 503.

<sup>59</sup> Setear, *supra* note 5.

<sup>60</sup> John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1, 8-10 (1997). Setear also argues that, to the extent there is a divergence between what IR theory predicts and the legal doctrines, the doctrines should be modified to conform with the rationalist design hypothesis because rationalist Institutionalism provides a normative theory of how international arrangements should be organized. See *id.* at 8.

<sup>61</sup> Abbott & Snidal, *supra* note 20.

<sup>62</sup> Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AJIL 231 (1997); see also Waller, *supra* note 49.

<sup>63</sup> Steinberg, *supra* note 62, at 232.

<sup>64</sup> In the now classic special issue of *International Organization* on regime theory, Robert Keohane observed that "[u]nderstanding the function of international regimes helps . . . to explain why actors have an incentive to create them, and may therefore help to make behavior intelligible within a rational-choice mode of analysis that emphasizes the role of incentives and constraints." Robert O. Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES 141, 149 n.22 (Stephen D. Krasner ed., 1983).

help international lawyers and policy makers think concretely about the requisite elements of an effective international institution.<sup>65</sup>

Moreover, as Abbott and Snidal point out, cataloguing the functions that institutions perform, while useful for these pragmatic reasons, may also help scholars tackle more penetrating questions. For instance, under which conditions will institutions perform functions well or poorly? The utility of a theory of what institutions do is inevitably limited without a theory of when they can do it well. A second set of questions focus on why particular international legal instruments take the form that they do and, conversely, what difference form makes. Interdisciplinary research analyzing the functions that international legal instruments perform may well be a predicate for answering these questions, for "[u]ntil IR develops a better sense of the range and importance of organizational functions, forms, and features, it cannot produce compelling theoretical arguments about them."<sup>66</sup> Both sets of questions present fruitful research projects for international legal scholars interested in the functions particular legal institutions perform.

### *Using IR Theory to Reconceptualize International Law and Institutions*

A third approach uses IR to critique and reconceptualize particular rules, institutions or international law as a whole by exposing and tinkering with the assumptions on which they are premised. Richard Shell, for example, employs IR theory to expose the assumptions or normative visions that underlie the structure of the General Agreement on Tariffs and Trade (GATT) so as to mount a critique of the WTO's organizational structure.<sup>67</sup> Shell argues that the structure of the WTO legal system and the content of the WTO's adjudicatory decisions reflect rationalist institutionalist assumptions that states are the primary actors in international politics and that states participate in the GATT to circumvent inefficient domestic trade policies. He then attacks those assumptions on normative grounds, arguing for a new institutional structure that gives standing to nonstate actors and sees its mission as not only promoting free trade, but also providing a forum for a dialogue in the civic republican tradition about distributive justice and procedural fairness among member nations.<sup>68</sup>

David Bederman traces how ideas about the legal status of international organizations developed in the legal academy and how a tension between "personality" and "community" came to define the character of international organizations.<sup>69</sup> He argues that a particular conception of international organizations as "persons" provided the basis for the emergence of epistemic communities and international regimes.<sup>70</sup>

<sup>65</sup> A recent article by Frank Garcia illustrates what such work might look like. Frank J. Garcia, *New Frontiers in International Trade: Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas*, 18 MICH. J. INT'L L. 357, 368-69 (1997) (drawing on Abbott & Snidal's work on meso-institutions to make proposals concerning the governance structure of the Free Trade Area of the Americas).

<sup>66</sup> Kenneth W. Abbott & Duncan Snidal, *Mesoinstitutions*, paper presented at Seminar on International Law and International Relations, Harvard Law School (1995).

<sup>67</sup> G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995).

<sup>68</sup> This—and a second article by Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359 (1996)—prompted a lively exchange with Philip Nichols over which school of IR theory supplies the best assumptions for the construction of the WTO. See Philip Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, *id.* at 851.

<sup>69</sup> David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte*, 36 VA. J. INT'L L. 275, 371, 376 (1996).

<sup>70</sup> An epistemic community is a set of experts, often located in multiple states, sharing a common core of values and beliefs, a specialized language or practice, and a common policy enterprise. The epistemic communities literature suggests that, by virtue of their expert knowledge in policy-relevant areas, such groups can influence the success or failure of international cooperation. See generally *Knowledge, Power, and International Policy Coordination*, 46 INT'L ORG. 1 (Peter M. Haas ed., 1992) (special issue).

Slaughter seeks to use IR theory to reconceptualize the basic definition of international law. She argues that the basic assumptions of liberal IR theory—that individuals and groups operating in domestic and transnational society are the primary actors in international relations, that they are represented in some manner by governments, and that intergovernmental relations privilege what states want (preferences) more than what they can get (power)—point to a much broader definition of international law.<sup>71</sup> Benedict Kingsbury draws on liberal IR theory to understand and untangle patterns of behavior in international trade and environmental issues. He explores and compares traditional state-based conceptions of international law with a vision of international law as the law of an emerging transnational civil society.<sup>72</sup>

Both Slaughter and Kingsbury also look to IR theory to help develop different conceptions of the state. Slaughter uses the liberal emphasis on state-society relations to highlight the need for a disaggregated model of the state, replacing the fiction of a unitary actor with a conception of distinct governmental institutions acting quasi-autonomously in the international system.<sup>73</sup> Kingsbury juxtaposes the traditional model of the state as principal, dominant in both IR and IL, with a liberal model of the state as agent, responding to individuals and groups in domestic and transnational society.<sup>74</sup> He assesses the advantages and disadvantages of the two conceptions in terms of the likely doctrinal impact both on specific groups, such as indigenous peoples, and on the long-term proposals for stability and society in the international system.

At its best, this type of scholarship can be powerful and exciting, opening up new vistas and challenging international lawyers to rethink fundamental assumptions of their discipline. However, it can also be highly abstract, requiring scholars working in this idiom to make a special effort to relate their theoretical insights to more concrete problems addressed by scholars working in specific subject areas.

### III. BRINGING LAW TO BEAR (AGAIN) ON INTERNATIONAL STUDIES

To this point, we have canvassed interdisciplinary work that examines international law and institutions through the lens of IR theory but does not necessarily engage IR theory in a dialogue about the nature and conditions of international life. In this section, we turn to interdisciplinary work in which international lawyers attempt consciously to challenge, supplement or develop the ideas and techniques of IR theory on questions of common concern to both disciplines.

International lawyers have had a range of reactions to the recent surge of interest in IR theory. Some have responded, "We thought of it first."<sup>75</sup> Other legal scholars object

<sup>71</sup> See Slaughter, *supra* note 10. Slaughter also uses IR theory to evaluate the efficacy and suitability of the law of extraterritoriality and recommends specific doctrinal changes grounded in a liberal theory of IR. See Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. J. INT'L L. & POL'Y 717 (1995). She conducts a similar analysis of the United Nations. See Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1995).

<sup>72</sup> Kingsbury, *supra* note 23.

<sup>73</sup> See Slaughter, *supra* note 10; Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept./Oct. 1997, at 183.

<sup>74</sup> Benedict Kingsbury, *Sovereign or Agent? Globalization, Democratization, and the Place of the State in International Law* (Feb. 1997) (unpublished manuscript, on file with authors).

<sup>75</sup> See, e.g., LYNNE M. JURGIELEWICZ, *GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: PROSPECTS FOR PROGRESS IN THE LEGAL ORDER* 116–17 n.6 (1996) (claiming that legal scholar L. F. E. Goldie "introduced the concept of regimes into international law over a decade before it was introduced into the international relations literature by Ernst Haas"). Without wishing to contribute further to this debate, we should also note that many people credit John Ruggie with originating the concept of international regimes. See John G. Ruggie, *International Responses to Technology: Concepts and Trends*, 29 INT'L ORG. 557, 569 (1975).

The more interesting general point is that lawyers are rediscovering their own concept of regimes, which differs from that used by political scientists, as Shinya Murase points out. Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, 253 RECUEIL DES COURS 283, 413–14 (1995).

to interdisciplinary collaboration with IR on the ground that IR and IL share complicity in creating and upholding a corrupt and demoralizing social system,<sup>76</sup> or that they share unacknowledged assumptions or political commitments.<sup>77</sup> Still others have welcomed the interest in IR theory while reasserting the value of ideas, projects and techniques developed and practiced in IL. Michael Byers recently declared, for example, that "international relations scholars need to be told that international law is different from the other factors they study."<sup>78</sup>

Byers's reaction, welcoming interdisciplinary work but reasserting the distinctiveness of law and legal institutions in international affairs, is shared by many international lawyers. While some early interdisciplinary accounts treated IR as the source of theory and method and IL primarily as the source of empirical raw materials (in the form of detailed histories, anecdotes and thick description), IL has gone far beyond being a mere repository of empirical work for interdisciplinary projects. Some interdisciplinary work reverses this division of labor altogether. Lori Damrosch's work on constitutional control over war powers, for example, takes an empirical proposition from IR, namely, that democracies do not go to war with each other, and seeks to explain it in terms of variation in the structures of domestic legal institutions.<sup>79</sup>

This section explores three ways that international lawyers are "bringing law to bear"<sup>80</sup> on interdisciplinary scholarship: by asserting the causal impact of legal rules, institutions and processes on actors and actions; by examining the role of law in the construction of actors and social structures; and by emphasizing the importance of law made by domestic or transnational actors in explaining international phenomena. None of these approaches denies the importance of power and self-interest in international politics, but each nevertheless claims a distinctive and substantial role for law.

### *Legal Process as a Causal Mechanism*

A number of international legal scholars have responded to the recent surge of interest in IR theory by arguing that the process by which international law is created, interpreted and applied has a distinctive effect on international behavior that is not fully captured by regime theory. These lawyers believe that law has a causal impact on international affairs through a process of communication on the basis of norms. This idea of legal process has had a broad and lasting influence in the international legal academy, especially in the United States, and has been used in several forms to respond to the current wave of interest in IR theory.

First, some scholars have drawn on the New Haven School's analysis of international law as a process of authoritative decision making designed to achieve particular normative goals

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(asserting that regimes are formed on a foundation of a treaty or treaties concluded between states or international organizations; that their objective is to realize either the shared interests of the states concerned or the general interests of the international community as a whole; that member states are required to fulfill nonreciprocal obligations toward the regime; and that regimes have self-contained procedures to settle claims and disputes among members). It is a more precise definition than the now-classic formulation used in Krasner's original volume on "international regimes," see Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES, *supra* note 64, at 1, 2, and it may be useful to both disciplines.

<sup>76</sup> See, e.g., PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD at xvii (1990); Philip Allott, *Kant or Won't: Theory and Moral Responsibility (The BSLA Lecture, December 1995)*, 23 REV. INT'L STUD. 339 (1997).

<sup>77</sup> See, e.g., Outi Korhonen, *Liberalism and International Law: A Centre Projecting a Periphery*, 65 NORDIC J. INT'L L. 481 (1996) (arguing, among other things, that international law and liberal IR theory share a basic liberal tradition and conceptual framework).

<sup>78</sup> Byers, *supra* note 5, at 205.

<sup>79</sup> Lori F. Damrosch, *Constitutional Control over War Powers: A Common Core of Accountability in Democratic Societies*, 50 U. MIAMI L. REV. 181 (1995).

<sup>80</sup> See Roger Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130 (1961); Nicholas G. Onuf & James L. Taulbee, *Bringing Law to Bear on International Relations Theory Courses*, PS (Am. Pol. Sci. Ass'n, Wash., D.C.), June 1993, at 249.

of human dignity and world order. For example, Lynne Jurgielewicz finds regime theory useful, but inadequate on its own, to analyze international environmental law. She supplements regime theory with the New Haven School's policy-oriented approach, in order to reflect the "decision-making process in which law making occurs."<sup>81</sup> She attempts to synthesize regime theory and policy-oriented legal process so as to highlight the role of "normative expectations" and the process by which enhanced knowledge and shared expectations gradually translate into a concrete set of legal rules.<sup>82</sup> Whether the New Haven School's approach presents a genuine alternative to power- or interest-based IR approaches, however, has long been debated by international lawyers and political scientists.<sup>83</sup>

The other major "process" approach to international law is the "international legal process" school, which continues to resonate strongly in the U.S. international law academy.<sup>84</sup> Its central claim is that the process of creating, interpreting and applying international law, while rarely outcome determinative, constrains state behavior by forming the basis on which actions must be justified, allocating decision-making authority, and determining the institutional structures within which political decisions are reached. It emphasizes the distinctiveness of law and legal reasoning as forms of social control. In recent years, Abram and Antonia Chayes have used this approach as a starting point to engage IR theory on the question of why states comply with treaty rules.<sup>85</sup> They agree with institutionalist IR theorists that treaties perform functions such as signaling, coordination, monitoring and enforcement; but they assert that IR theory fails to appreciate the unique role that legal process plays in the performance of these functions. In their view, the most important influence on governments' compliance choices is engagement in the ongoing discursive practices of explanation, justification and persuasion in which states necessarily engage as members of the network of interdependent, overlapping regulatory regimes that characterizes current international affairs.<sup>86</sup>

Byers, in his response to Setear, argues that the impact of a legal rule derives not merely from its having been "iterated" but from "the fact that it is the result of rule creating processes within a legal system."<sup>87</sup> Unlike other factors studied by political scientists, legal rules "are not generally subject to change solely in response to fluctuations in the immediate interests of states."<sup>88</sup> Customary rule-creating processes, Byers argues, give rules a legal specificity that enables them to shape future behavior through a sense of obligation, thus constraining and modifying state power.<sup>89</sup>

<sup>81</sup> JURGIELEWICZ, *supra* note 75, at 244.

<sup>82</sup> *Id.* at 111 (quoting L. F. E. Goldie, *Special Regimes and Preemptive Activities in International Law*, 11 INT'L & COMP. L.Q. 670 (1962)).

<sup>83</sup> See, e.g., Stanley Hoffmann, *The Study of International Law and the Theory of International Relations*, 57 ASIL PROC. 26 (1963).

<sup>84</sup> See, e.g., ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* (1968); ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (1974). For a recent comparison of the New Haven School and the international legal process approach, see Koh, *Why Obey?* *supra* note 11, at 2618-19.

<sup>85</sup> CHAYES & CHAYES, *supra* note 6; see also Abram Chayes & Antonia H. Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); Abram Chayes & Antonia H. Chayes, *Adjustment and Compliance Processes in International Regulatory Regimes*, in *PRESERVING THE GLOBAL ENVIRONMENT: THE CHALLENGE OF SHARED LEADERSHIP* 280 (Jessica T. Mathews ed., 1991).

<sup>86</sup> See CHAYES & CHAYES, *supra* note 6, at 118-23. This discursive process has several distinctive characteristics: it is carried out on the basis of legal norms; actors must attempt to gain assent to their value judgments on reasoned rather than idiosyncratic grounds; and normative factors such as legitimacy (of both the process and the substance of rule making) play a large role in justification and persuasion. The model draws substantially on Thomas Franck's analysis of the roles of legitimacy and fairness in international law. See FRANCK, *supra* note 27; FRANCK, *supra* note 32.

<sup>87</sup> Byers, *supra* note 5, at 203.

<sup>88</sup> *Id.* at 204.

<sup>89</sup> Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109 (1995).

A final example of work in this vein is Koh's effort to develop a causal, predictive account of why actors obey international law.<sup>90</sup> His model of "transnational legal process"<sup>91</sup> departs from previous international legal process approaches by focusing on *transnational* processes of interaction involving not just states, but governmental and nongovernmental actors and domestic and international legal institutions. He argues, contrary to both rationalist regime theory and what he considers to be Louis Henkin's utilitarian approach,<sup>92</sup> that compliance with international rules is not explained entirely by the functional benefits it provides but, rather, by the process of internalization of international legal norms into the internal value sets of domestic legal systems. This internalization occurs through a complex process of repeated interaction, norm enunciation and interpretation, which occurs in such varied contexts as transnational public law litigation in domestic courts, international commercial arbitration, and lobbying of legislatures by nongovernmental organizations.<sup>93</sup>

*Law and the Social Construction of the International System*

Rationalist regime theory assumes actors with fixed or exogenously given interests and focuses on the "instrumental" question of how international institutions and power relations affect the pursuit of these fixed interests. As a result, it tends to confine law to a "normative optic." Keohane offers a synthesis of these "instrumental" and "normative" modes of analysis that would give law a distinctive role, in the form of persuasion on the basis of shared norms, but this synthesis still assumes that states pursue fixed interests.<sup>94</sup> Many legal scholars propose a fundamentally different account of the role of law in international relations, contending that the processes of persuasion and justification on the basis of norms play a *constitutive* role in the formation of actors' identities and interests and in the structure of the international system itself. On a deeper level, this approach rejects a simple law/power dichotomy, arguing instead that legal rules and norms operate by changing interests and thus reshaping the purposes for which power is exercised.<sup>95</sup>

Chayes and Chayes suggest that participation in international legal process can contribute to transformation of states' identities and interests in the direction of treaty norms.<sup>96</sup> Koh makes this idea a central feature of his model. For him, the process of interaction and internalization is constitutive: each instance of interaction and norm interpretation "generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process," so that they perceive compliance to be in their self-interest.<sup>97</sup> Similarly, Abbott, in an article that draws on ideational explanations to supplement a rational choice framework, argues that shared ideas about markets, politics and state-society relations influence economic and political structures such as states, markets and international regimes; that these structures owe their existence to such constitutive ideas; and that they change as these ideas change.<sup>98</sup>

<sup>90</sup> See Koh, *Why Obey?* *supra* note 11, at 2600.

<sup>91</sup> See *id.*; see also Koh, *Transnational Process*, *supra* note 11.

<sup>92</sup> HENKIN, *supra* note 26.

<sup>93</sup> Koh, *Why Obey?* *supra* note 11, at 2646.

<sup>94</sup> Keohane, *supra* note 8.

<sup>95</sup> Cf. Hurrell, *supra* note 38, at 53 (arguing that the central challenge facing both international law and regime theory is to show that law and norms exert behavioral constraints on actors at least partially independently of power or interest).

<sup>96</sup> CHAYES & CHAYES, *supra* note 6, at 27.

<sup>97</sup> Koh, *Why Obey?* *supra* note 11, at 2646 (drawing in part on constructivist IR theory).

<sup>98</sup> Kenneth W. Abbott, "Economic" *Issues and Political Participation: The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV. 971 (1996) (citing John G. Ruggie, *International Regimes, Transactions, and*



Martti Koskenniemi challenges the law/power dichotomy by claiming that realist approaches to collective security fail "to see to what extent their determining concepts such as 'interest,' 'power,' or 'security' are themselves defined and operative within a normative context" of international legal discourse.<sup>99</sup> Recounting his experience as a member of the Finnish delegation to the Security Council during the Iraq-Kuwait crisis, Koskenniemi argues that normative discourse among members of an international community constitutes and transforms the members' identities and self-interests and the meaning of "security" and "aggression," and makes possible and meaningful the organization and application of physical power, in a manner not grasped by causal-descriptive IR theory.<sup>100</sup>

Finally, Shirley Scott suggests a different way to challenge rationalist IR's law/power dichotomy. Whereas "legal process" scholars such as Chayes and Chayes and Koh challenge the dichotomy (in part) by characterizing "legitimacy" as a type or source of power,<sup>101</sup> Scott challenges it by analyzing international law as an ideology, and ideology as power.<sup>102</sup> She argues that demonstrated acceptance of the ideology of international law is a sine qua non of membership in the international system, and that this ideology upholds the power structure of the system by presenting itself in a way that blocks the evidence of the power structure and of its own relationship to that structure.<sup>103</sup>

### *Domestic and Transnational Law as Explanatory Variables*

A third way that international lawyers are making a substantive contribution to the IR literature is by emphasizing the importance of domestic and transnational law. Transnational law, as originally conceived by Philip Jessup,<sup>104</sup> swept all domestic law bearing on international relations and law regulating relations between governments and foreign nationals into international law's embrace. The *Restatements* of American foreign relations law have been animated by a similar spirit.<sup>105</sup> And the study of international law in domestic courts is a perennial favorite among international lawyers.

Liberal IR theory casts much of this work in a new light by emphasizing the relationship between domestic politics and international behavior. In particular, the large, and still growing, literature on the democratic peace probes the correlation between liberal democratic government and a state's propensity to go to war.<sup>106</sup> As noted above, Lori Damrosch takes that correlation at face value and explores the link between the democratic peace and constitutional provisions governing the division of war powers between the executive and the legislature.<sup>107</sup> Thomas Franck demonstrates the link, "in normative

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*Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 195 (1982), and Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384 (1994)).

<sup>99</sup> Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, 464 (1996) [hereinafter Koskenniemi, *Place of Law*]; see also Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990).

<sup>100</sup> Koskenniemi, *Place of Law*, *supra* note 99, at 467-78.

<sup>101</sup> See *supra* note 86. On the other hand, Koh criticizes Franck's approach for its failure to account for the process by which norms are internalized by domestic legal systems. Koh, *Why Obey?* *supra* note 11, at 2633.

<sup>102</sup> Shirley V. Scott, *International Law as Ideology: Theorizing the Relation Between International Law and International Politics*, 5 EUR. J. INT'L L. 313 (1994).

<sup>103</sup> *Id.*

<sup>104</sup> PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956).

<sup>105</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

<sup>106</sup> See, e.g., PATHS TO PEACE: IS DEMOCRACY THE ANSWER? (Miriam F. Elman ed., 1997); DEBATING THE DEMOCRATIC PEACE (Michael E. Brown, Sean M. Lynn-Jones & Steven E. Miller eds., 1996); BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1986); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 1*, 12 PHIL. & PUB. AFF. 205 (1983); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 2*, *id.* at 323.

<sup>107</sup> See Damrosch, *supra* note 79.

text and practice," between "compliance with the norms prohibiting war making" and "observance of human rights and the democratic entitlement."<sup>108</sup> And Brad Roth challenges the thin definition of democracy used by many IR theorists.<sup>109</sup> Many other lawyers are turning their attention to the entire gamut of relationships between democracy and international law.<sup>110</sup>

More generally, Slaughter argues that liberal IR theory provides a coherent analytical framework for sorting out the jumble of different types of law and legal actors currently encompassed by transnational law.<sup>111</sup> She focuses on bodies of rules and norms that have largely been ignored by political scientists and international lawyers alike. Liberal IR theory privileges individuals and groups in their relations with one another and with the state, in either its unitary or its disaggregated form.<sup>112</sup> Liberal IR theorists should thus expand their study of rules and regimes to include domestic law regulating individual-individual and individual-state relations, the heart of transnational law. In addition, however, both IR and IL scholars should pay more attention to voluntary codes of conduct adopted by corporate and other private actors, as well as emerging bodies of transgovernmental law, such as the rules and principles adopted by securities regulators, central bankers, environmental officials and others operating transgovernmentally to guide their domestic activities.

Finally, Slaughter's emphasis on the disaggregated state and Koh's model of transnational legal process highlight national courts, government agencies and legislators as international or transgovernmental actors in their own right. To the extent that these institutions are constrained by domestic law, domestic legal rules emerge as a constraint on state action in the international system. This "bottom up" approach complements the traditional focus on domestic implementation of international rules and confronts political scientists and international lawyers alike with new worlds to conquer, or at least to analyze.

To summarize, international lawyers are exploring the causal impact of international legal process on state behavior, examining the constitutive role of normative discourse in international affairs, and asserting the explanatory relevance of domestic, transnational and transgovernmental actors, laws and institutions. In each of these areas, they are reasserting the distinctive role of law and norms in explanations of international affairs and inviting IR theorists to join in a dialogue on questions of common concern to both disciplines.

#### IV. THE IR/IL NEXUS: A PROPOSED COLLABORATIVE RESEARCH AGENDA

The purpose of this article is not only to track the interdisciplinary trajectory thus far, but also to explore how IR and IL scholars might collaborate most profitably in the future. We begin by mapping three integrated subfields of what might be thought of as a "joint discipline."<sup>113</sup> The purpose of this mapping exercise is less to draw new disciplinary

<sup>108</sup> Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46, 89 (1992); see also Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE INT'L L.J. 539 (1992); Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1 (1995).

<sup>109</sup> Brad R. Roth, *Evaluating Democratic Progress: A Normative Theoretical Approach*, 9 ETHICS & INT'L AFF. 55 (1995).

<sup>110</sup> For a critical review of this literature, see Susan Marks, *The End of History? Reflecting on Some International Legal Theses*, 8 EUR. J. INT'L L. 449 (1997).

<sup>111</sup> Slaughter, *supra* note 10, at 504.

<sup>112</sup> See Moravcsik, *supra* note 15.

<sup>113</sup> In remarks in 1992, Kenneth Abbott introduced the concept of a "joint discipline," which he defined as "the study of organized international cooperation." Kenneth W. Abbott, *Elements of a Joint Discipline*, 86 ASIL PROC. 167 (1992) (remarks at panel entitled "International Law and International Relations Theory: Building Bridges"). We borrow the term, but with a broader definition.

boundaries than to offer an alternative to the straightforward projection of IR theoretical paradigms onto IL. We delineate three areas of convergence between international lawyers and international political scientists who share roughly the same deep assumptions about the international system and are interested in similar subjects. We then turn to a catalogue of research questions that could structure a more collaborative intellectual and practical agenda.

In undertaking both these tasks, we hope to open a debate more than to shape one. Scholars from both disciplines are invited to challenge our categories and questions and offer their own.

### *Mapping the Joint Discipline*

The first subfield is best described by Abbott's label, "international governance theory."<sup>114</sup> It focuses on the organizational features, functions and purposes of the structures and institutions that order international life and are situated "above" the level of the state.<sup>115</sup> IL work that focuses on the function and structure of international law and institutions fits squarely within this domain, as does more recent IR work that has taken international law and formal international organizations as serious research subjects. The methodology is usually rationalist, and most research in this vein brackets the role of domestic politics and the constitutive dimensions of rules and interstate interaction.

The second subfield examines social construction through shared norms. It focuses on the impact of norms and norm-based discourses on actors and social structures in the international system. Many IR constructivists and critical scholars in both disciplines are exploring, in varying ways, the same basic proposition: that actors, identities, interests and social structures are culturally and historically contingent products of interaction on the basis of shared norms. In addition, recent IL work (particularly by Chayes and Chayes and Koh) on the transformation of interests and behavior through discursive processes of argument, persuasion and internalization draws on and responds to constructivist IR scholarship.

The third subfield falls under the general label of liberal agency theory. Scholars working in this vein focus on the nexus between international and domestic law and politics. Many IR scholars are turning to comparative politics to help map patterns of state behavior, rejecting the possibility of positing consistent preferences for states *qua* states.<sup>116</sup> International law has moved in five short years from a discipline in which distinguishing between states in terms of domestic regime type was virtually taboo to sufficient acceptance and incorporation of democratic peace theory to invite attacks on "liberal millenarianism."<sup>117</sup> The fundamental assumption orienting this work is that the concept of a domain of unitary and functionally identical rational state actors interacting "above" the level of the state is deeply artificial and ultimately counterproductive. Interstate relations should instead be studied as a function of state-society relations, relations that are structured very differently across different societies and cultures but that involve the state as an agent of social actors.<sup>118</sup>

These subfields represent just one way of mapping the interdisciplinary field, one that overlaps, but also goes beyond, the basic IR paradigms of Institutionalism, Constructivism

<sup>114</sup> Kenneth W. Abbott, Remarks on "Rationalistic Theory," paper presented at conference on international law and international relations, Yale Law School, at 1 (Feb. 22-24, 1996).

<sup>115</sup> *Id.* at 4.

<sup>116</sup> See Andrew Moravcsik, *From the Outside In: International Relations and the "Obsolescence" of Comparative Politics*, APSA-CP (newsletter of the American Political Science Association section on comparative politics), Summer 1996, at 9.

<sup>117</sup> See Marks, *supra* note 110.

<sup>118</sup> See Kingsbury, *supra* note 74.

and Liberalism. By focusing on substantive themes animating different categories of interdisciplinary scholarship, we hope to move toward a much more specific research agenda. We therefore introduce six research questions, or sets of questions, that IR and IL scholars working from a variety of methodological, epistemological and ontological premises might profitably explore together.

This strategy helps avoid two potential pitfalls in interdisciplinary work. First, laying out substantive questions for joint research underscores the necessity of moving beyond intellectual history and mapping exercises. Second, the research question format emphasizes that interdisciplinarity is not an end in itself. As Kratochwil warns, unless great care is taken, “the distinctive contributions various ‘disciplines’ make to our understanding get lost, and behind the phrases of ‘integration’ and bridge-building stands possibly an impoverished rather than an original and fecund new research agenda.”<sup>119</sup> The task is to identify key substantive puzzles “to which a variety of approaches and methodological orientations can then contribute.”<sup>120</sup>

### *A Collaborative Research Agenda*

#### *1. Regime Design: What are the specific design features that best address and respond to particular types of international problems?*

International lawyers have long assumed that the design of an international institution can affect how well it fulfills its goals. Recent empirical work in IR has begun to demonstrate this proposition by showing that structural variations can affect compliance rates with international treaties.<sup>121</sup> This work opens up a relatively unexplored research vein: the identification of the specific design features that best address particular types of international problems.

Interdisciplinary collaboration can enhance the contribution that each discipline might independently make to this research. As noted in part II, a great deal of prescriptive IL scholarship does not specify assumptions about how states behave or why international agreements might break down. Yet effective regime design requires a theory of why states cooperate through institutional arrangements and why those arrangements might not succeed. IR theory suggests some important variables—the distribution of power among member nations, the roles of interested substate and nonstate groups, the potential for opportunism—which themselves imply design options that may improve an institution’s effectiveness (e.g., adding or subtracting member states, granting standing in international organizations to particular domestic or transnational interest groups, and creating incentives to deter cheating).

Conversely, although IR theory predicts when institutionalized cooperation might occur and specifies the functions that institutions perform, its prescriptive implications tend to be abstract. Advice such as “improve monitoring” and “facilitate information exchange” is pitched at too high a level of generality to be useful to international lawyers or other regime architects. Detailed knowledge of law and legal institutions permits the IR scholar to go beyond midlevel generalizations to specify a distinctive set of design options and possibilities. This is in part the animus behind the recent work by Abbott and Snidal on the functions performed by different types of formal international organizations.<sup>122</sup>

<sup>119</sup> Friedrich Kratochwil, *Constructivism as an Approach to International Law and International Relations*, paper presented at conference on international law and international relations theory, Yale Law School, at 2 (Oct. 1997).

<sup>120</sup> *Id.* at 4.

<sup>121</sup> See Ronald B. Mitchell, *Regime Design Matters*, 48 INT’L ORG. 425 (1994).

<sup>122</sup> See Abbott & Snidal, *supra* note 20.

The ultimate goal of this research would be to specify the institutional design options that best address particular types of international problems.<sup>123</sup> It is difficult to predict the path such research might take. Game-theoretical work might analogize international policy problems to particular configurations of information and incentives—the Prisoner's Dilemma, for example—and translate the general prescriptions of the game-theory literature into concrete proposals grounded in specific institutional features. Alternatively, scholars interested in the links between compliance and domestic politics might begin to code international problems according to the configuration of a specified domestic factor postulated to bear on the efficacy of any given policy solution.

This research question does not presuppose a commitment to a particular set of assumptions about the international world or to any particular epistemological or ontological orientation. Realists might explore how best to assure that international institutions remain effective instruments through which powerful states maintain the balance of power. Institutionalists might focus on mechanisms that reduce the opportunity for cheating, such as monitoring, the use of hostages and bonds, and the other methods of making credible commitments to support exchange that are explored in the literature on law and economics, industrial organization, and transaction-cost economics. Liberals might focus on design features that enhance and shape the links between the institution and domestic institutions and interest groups. Constructivists might seek to identify the design features that facilitate the type of interstate interaction most likely to positively transform identities and interests around a preferred international norm. In each approach, the substantive puzzle at the heart of the inquiry remains the same.

In exploring this research vein, IR and IL scholars might both profitably examine the analogy of international regime design to the creation of “deals” or cooperative commercial enterprises undertaken by competitive business firms in domestic arenas. Analogizing states to firms is not uncommon and is at least superficially compelling because both can be modeled as self-interested, boundedly rational actors operating in a milieu where distributional issues (profits and security) matter.<sup>124</sup> Interfirm bargaining—a topic that one scholar asserts should be the subject of a “whole new research program”<sup>125</sup>—has received considerable attention from corporate law scholars and specialists in law and economics. These scholars have developed a sophisticated understanding of the relationship between deal structure and compliance incentives. Ronald Gilson, for example, has developed what is in effect a functional theory of merger agreements; in terms that echo Keohane, his work explains how the basic provisions contained in standard merger and acquisition agreements provide a solution to various forms of market failure.<sup>126</sup> A close analysis of various business deals—and the scholarship of those who study them—might provide insights for a theory of international institutional design.<sup>127</sup>

<sup>123</sup> As Keohane recently observed, “the most fundamental question scholars wish to answer concerns effectiveness: What structures, processes, and practices make international institutions more or less capable of affecting policies—and outcomes—in desired ways?” Robert O. Keohane, *International Institutions: Can Interdependence Work?* FOREIGN POL’Y, Spring 1998, at 82, 89.

<sup>124</sup> Several international relations scholars have analogized the international system to a market. The most prominent of these market analogies treats states as oligopolistic firms, and posits several similarities between the two, including that both firms and states act strategically; both may be conceptualized as rational egoists; elimination is possible; and both may “exit” from cooperative ventures. See KEOHANE, *supra* note 3, at 89; Duncan Snidal, *The Game Theory of International Politics*, in COOPERATION UNDER ANARCHY 31 (Kenneth A. Oye ed., 1986).

<sup>125</sup> See Susan Strange, *States, Firms, and Diplomacy*, in INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH 61 (Jeffrey A. Frieden & David A. Lake eds., 3d ed. 1995).

<sup>126</sup> Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

<sup>127</sup> Charles Lipson points out that the analogy between states and firms is not perfect, since, unlike states, firms bargain in a milieu where legal promises can be enforced by a third party. See Lipson, *supra* note 20, at 503–04. The analogy may still be fruitful, however, because “deals” remain durable not only, and sometimes

2. *Process Design: How should governments structure the process by which new international legal instruments and institutions are negotiated?*

Many IR models of bargaining use outcome as their dependent variable. Independent variables are typically asymmetries in "power" or specified resources and capabilities. In recent years, a robust interdisciplinary scholarship on bargaining has called the utility of these types of models into question.<sup>128</sup> The insight of this research is that outcomes cannot be explained solely by the preferences and payoffs of the players; they are dependent in part on the *process* by which bargainers seek to resolve conflict or achieve consensus. At least in bargains characterized by incomplete information and boundedly rational actors, some mutually beneficial agreements will not be achieved simply because the negotiation process is structured poorly, not because there is no zone of possible agreement. Therefore, for IR and IL scholars who believe that institutions "matter," the process by which states negotiate new international legal instruments should be of crucial interest.

An inquiry into "process design" would seek to specify the optimal process strategies for facilitating consensus in international multilateral negotiations. Relevant questions include: How should stakeholders be determined? What is the most appropriate role for interested substate and transnational actors? Should the goal be to negotiate an agreement between a few key countries or an agreement with universal participation? Should decision making occur by consensus, majority vote or some other principle? Who should control the agenda, and how? How should information be produced and exchanged? What conditions might produce a shift in the cognitive frames of the bargainers, so that they see the payoffs not as zero-sum but as offering mutual gains? What is the best procedure for making sensitive distributional choices? How might procedure ease "behind the table" constraints on the bargaining agents? What are the respective roles of formal negotiation processes and parallel informal negotiations?<sup>129</sup>

Insights from game theory, institutional economics, decision theory, prospect theory, social psychology and negotiation analysis can inform this inquiry,<sup>130</sup> building on work in IR on multiparty negotiations, coalitions, holdout problems, internal-external negotiations and two-level games. Like research on regime design, this research vein can be explored through rationalist,<sup>131</sup> liberal<sup>132</sup> and constructivist<sup>133</sup> lenses. Insights will be particularly timely, given the increasing trend toward legalized international cooperation.

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not even primarily, because the parties have made legally binding promises to one another, but because their agreements build in "incentive structures" that make compliance compatible with each side's self-interest. See ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *THE LAWYER AS NEGOTIATOR* (forthcoming).

<sup>128</sup> See James K. Sebenius, *Challenging Conventional Explanations of International Cooperation: Negotiation Analysis and the Case of Epistemic Communities*, 46 INT'L ORG. 323, 330 (1992) (discussing the limitations of standard two-by-two bargaining models that juxtapose cooperation and defection).

<sup>129</sup> Sebenius has highlighted the importance of these questions. James K. Sebenius, *Designing Negotiations Toward a New Regime*, 15 INT'L SECURITY 110 (1991); see also Stepan Wood, *Renegades and Vigilantes in Multilateral Environmental Regimes: Lessons of the Canada-EU "Turbot War,"* in INNOVATIONS IN INTERNATIONAL ENVIRONMENTAL NEGOTIATION 184 (Lawrence E. Susskind et al. eds., 1998) (examining negotiation processes within existing international environmental organizations).

<sup>130</sup> For an overview of the interdisciplinary research on dispute resolution, see BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1995).

<sup>131</sup> Several scholars have explored coalition dynamics in multiparty bargains characterized by incomplete or asymmetric information. See generally HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); David Lax & James K. Sebenius, *Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing*, in NEGOTIATION ANALYSIS 153 (Peyton Young ed., 1991); James K. Sebenius, *Sequencing to Build Coalitions: With Whom Should I Talk First?* in WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 324 (Richard J. Zeckhauser et al. eds., 1996).

<sup>132</sup> See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); see also DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans, Harold K. Jacobson & Robert D. Putnam eds., 1993).

<sup>133</sup> If one can specify the conditions in which intersubjective understandings of interstate relations are positively transformed, it may be possible to structure the process by which states (or their agents) negotiate

3. *Discourse on the Basis of Shared Norms: How precisely are actors and social structures mutually constituted by social practices? What is the role of power in the discursive production of identities and shared meanings? What counts as "proof" in norm-based discourse?*

One possibility suggested by the previous set of collaborative research questions is that participation in international negotiation and bargaining may lead to the transformation of actors' perceptions of their self-interest. This is reminiscent of the claim that actors and social structures in the international system are constituted and transformed by argument, reasoning and persuasion on the basis of shared norms.<sup>134</sup> The present set of research questions is designed to focus on certain aspects of this claim that pose particular challenges to both IL and IR scholars.

First, research should focus on developing a *theory or theories of action* appropriate for norm-based discourse.<sup>135</sup> Legal scholarship and practice are likely to be good sources of analysis and empirical material for this task. As Kratochwil says, "[S]ince lawyers have been arguing with rules all their lives, their 'style' of argument as well as their methodologies deserve far greater attention than they have received from social scientists."<sup>136</sup> In addition, because normative discourse is communication, theories of speech and language are central to this enterprise.<sup>137</sup> Finally, what counts as a theory or explanation of action may be extremely context dependent, raising the question of whether the goal of research can be to develop a single theory of action.

Another issue for collaborative research is the relationship between norms and power, an issue that most approaches based on a linguistic analogy or on the idea of communicative action, including Chayes and Chayes's "discursive justification," do not fully address. The idea that identities, interests and international social structures are produced by interaction on the basis of shared norms suggests that "power" consists of something more than just material capabilities, but it does not tell us precisely what "power" means or how it relates to the production of actors and shared meanings. The realist claim that normative discourses offer mere "facade legitimation" for material power relations is not a complete answer, because it fails to appreciate that "legitimation or justification always has a 'facade' aspect to it without this making it any less necessary."<sup>138</sup> Research and theorizing should focus on the subtle question of how power relations, on one hand, and language, argument, norms and shared knowledge, on the other, intertwine and implicate each other.<sup>139</sup>

Third, collaborative research should develop accounts of what counts as *proof* in norm-based discourses: how is the effect of persuasion achieved and what role does persuasion

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in a manner likely to produce those conditions. The first step in such research would be to analyze empirically validated moments of "transformation" in specific international negotiations to generate a set of hypotheses about why transformation takes place. For a claim that the interests of the United States and the Soviet Union changed during the Cuban missile crisis as a result of the specific bargaining process undertaken by Kennedy and Khrushchev, see Richard N. Lebow, *Beyond Parsimony: Rethinking Theories of Coercive Bargaining*, 4 EUR. J. INT'L REL. 31 (1998).

<sup>134</sup> See *supra* notes 40–42 and corresponding text, and notes 96–97 and corresponding text.

<sup>135</sup> See Ole Wæver, John G. Ruggie: *Transformation and Institutionalization*, in FUTURE OF IR, *supra* note 34, at 170; Marlene Wind, Nicholas G. Onuf: *The Rules of Anarchy*, in *id.* at 236; Erik Ringmar, Alexander Wendt: *A Social Scientist Struggling with History*, in *id.* at 269.

<sup>136</sup> Kratochwil, *supra* note 119, at 30.

<sup>137</sup> See, e.g., Ruggie, *supra* note 40, at 19; Kratochwil, *supra* note 119, at 9, 11; Wendt, *supra* note 40, at 411.

<sup>138</sup> Koskenniemi, *Place of Law*, *supra* note 99, at 477.

<sup>139</sup> Ruggie, *supra* note 40, at 42 (posing the question whether and how linguistic structures are implicated in power relations). The issue can be and has been approached from many theoretical and methodological perspectives. See, e.g., FRANCK, *supra* note 27 (norms and legitimacy as influences on state behavior); Rodney Bruce Hall, *Moral Authority as a Power Resource*, 51 INT'L ORG. 591 (1997) (moral authority as a source of political power in feudal Europe); Scott, *supra* note 102 (dominant ideology of international law as a form of power); Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993*, 16 HUM. RTS. Q. 1 (1994) (international legal discourse as a determinant of and constraint on possibilities for identity and action).

on the basis of norms play in contemporary world politics?<sup>140</sup> Among other things, this inquiry implicates one of the metatheoretical issues urged by constructivist IR theorists: what should "count" as a test of knowledge in international affairs?<sup>141</sup>

These questions are based, ultimately, on the idea that norms and other intersubjective structures are "always in process." The goal of this research should be to develop convincing accounts of precisely how such structures are continuously formed and transformed by discursive practice, and how they continuously set the terms by which actors interpret their own and others' identities, interests, and actions.<sup>142</sup>

4. *Transformation of the Constitutive Structures of International Affairs: How did the fundamental structures of the system of sovereign states emerge? What sustains these structures, and what are the conditions for their transformation? How do these structures operate to limit or exclude certain possibilities for identity and action, while making others appear natural or necessary or given?*

Any investigation of the role of argument and persuasion on the basis of shared norms must sooner or later take account of the fact that discursive practices are situated or embedded in deeper normative structures, such as states, sovereignty and anarchy, that constitute the organizing principles of the international system. One of the lasting, and still-pertinent, questions for international studies concerns when and how transformation occurs in the fundamental social structures of international affairs.

Interdisciplinary research should enrich our understanding of how these fundamental structures are ongoing products of practice.<sup>143</sup> Both IR and IL scholars have examined how the fundamental categories of the international system are historically and culturally contingent artifacts.<sup>144</sup> In political science, for example, John Ruggie has argued that the emergence of modern sovereignty and territoriality represented a transformation of the structure of the international system; Kathryn Sikkink has addressed lawyers on past and present practices of sovereignty; and Jens Bartelson consciously skirts disciplinary boundaries in a genealogical study of sovereignty.<sup>145</sup> Both legal and IR scholars have examined the contradictions and indeterminacy of the structures of international life.<sup>146</sup> Moreover, numerous IL scholars have shown that demystification of sovereignty has been a part of the culture of international law for decades.<sup>147</sup>

As these comments might suggest, a central theme of joint research should be the intellectual histories of the two disciplines, since the concepts that serve as the fundamental elements of our disciplinary self-understandings and enable the construction of mean-

<sup>140</sup> See, e.g., Keohane, *supra* note 8, at 488.

<sup>141</sup> See, e.g., Kratochwil, *supra* note 119, at 30.

<sup>142</sup> Cf. Wendt, *supra* note 40.

<sup>143</sup> See *id.* at 413 ("The sovereign state is an ongoing accomplishment of practice, not a once-and-for-all creation of norms that somehow exist apart from practice.").

<sup>144</sup> In IL, see, e.g., Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996); Nathaniel Berman, "But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law, 106 HARV. L. REV. 1792 (1993).

<sup>145</sup> See John G. Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139 (1993); Kathryn Sikkink, *Reconceptualizing Sovereignty in the Americas: Historical Precursors and Current Practices*, 19 HOUS. J. INT'L L. 705 (1997); and JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* (1993). See also STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., 1996).

<sup>146</sup> In IR, see, e.g., R. B. J. WALKER, *INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY* (1993); INTERNATIONAL/INTERTEXTUAL RELATIONS: POSTMODERN READINGS OF WORLD POLITICS (James Der Derian & Michael J. Shapiro eds., 1989); Richard Ashley & R. B. J. Walker, *Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies*, 34 INT'L STUD. Q. 367 (1990). In IL, see, e.g., MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989); and DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987).

<sup>147</sup> David Kennedy, *Receiving the International*, 10 CONN. J. INT'L L. 1, 6-7 (1994); see also Annalise Riles, *The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, 6 LAW & CRITIQUE 39, 53 (1995) (arguing that postmodern deconstruction was anticipated in international law scholarship as early as the 19th century).



ing are themselves historically contingent formations.<sup>148</sup> David Kennedy has broken ground in international law by demonstrating how the meanings of fundamental terms of the discipline change over time and give rise to styles and preoccupations that seem bizarre to later observers.<sup>149</sup> Some of the most interesting work in this genre traces how each successive self-understanding of international law or international relations naturalizes a new set of assumptions while denaturalizing an older set, and, more subtly, shows that the older set achieves the height of its coherence and solidity only in retrospect.<sup>150</sup>

5. *Government Networks: How do the regimes established by state units—administrative agencies, courts, executives, legislators or legislative committees—differ from traditional regimes? Do they serve different functions? Arise under different circumstances? Have different legal properties?*

Many have now documented the ways the regime theorists' account of the origins of and functions performed by international institutions dovetail with the understandings of those institutions developed by international lawyers. However, the insistence of liberal IR theory on the "state as agent" and the concomitant disaggregation of the state into the institutions that actually represent and regulate individuals and groups in domestic and transnational society focus attention on a different type of international regime: "government networks" created by state units. These networks themselves differ in terms of relative formality and informality; some constitute transgovernmental organizations that would easily qualify as an "institution" according to any political scientist's or international lawyer's definition;<sup>151</sup> others qualify less as "rules, norms, principles, and decision-making procedures" than as loose groupings of designated actors in routine contact with one another over common concerns and problems.<sup>152</sup> Can they nevertheless be analyzed by using the same conceptual apparatus applicable to interstate regimes?

More specifically, from a political science perspective, will the difference in decision makers within the regime or network actually yield different policy outcomes? Do these regimes address different types of problems? Are they subject to different constraints? From a legal perspective, should state units have independent legal status in the international system? The answer will likely depend, at least in part, on whether state units prove to diverge from the positions taken by the unitary state and thus reach different policy outcomes. Assuming the answer is yes, however, should government units be accorded independent legal status, at least for some purposes? How should we monitor and regulate them as international decision makers? Should we be adopting more of a legal process approach and replace substantive rules with procedural determinations designed to shunt issues to specific decision makers?

Finally, how should we treat the rules generated by government networks? What are their status and normative force? The Basel Committee, for instance, has developed a set of core principles of sound banking regulation, which it hopes will be adopted by central bankers around the world. Similarly, the IOSCO Technical Committee has re-

<sup>148</sup> See Kratochwil, *supra* note 119, at 12.

<sup>149</sup> See, e.g., David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986); David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987); David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7.

<sup>150</sup> See, e.g., David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 NORDIC J. INT'L L. 385 (1996); and Wæver, *supra* note 34, at 9–10.

<sup>151</sup> Examples include the Basel Committee of central bankers, the International Organization of Securities Commissioners (IOSCO), the International Association of Insurance Supervisors, and the Organization of the Supreme Courts of the Americas. See David T. Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998).

<sup>152</sup> Examples in this category include informal contacts among government departments charged with the oversight of competition policy, environmental policy, criminal law enforcement, labor policy, etc. Informal contacts among judges from other countries would also qualify. See Slaughter, *supra* note 73.

leased general standards for securities regulators.<sup>153</sup> Do such principles constitute customary international law? They are generated by state units rather than states and are not intended to be binding in the usual sense. But the entities that generate them comply not only in the belief that they represent an international consensus as to best practice, but also out of a sense of commitment to their fellow regulators.

These questions can be approached from a wide range of theoretical perspectives. Functionalist accounts in both law and political science will focus on rational incentives; constructivist analyses may examine the extent to which government networks constitute "epistemic communities" sharing critical epistemological assumptions and professional values. Liberal theories, on the other hand, will emphasize the relationship between state units and their social, economic and political constituencies. All three of these approaches will benefit from a lawyer's probing of whether perceived differences between government networks and conventional regimes should carry normative significance and, if so, how to operationalize it.

6. *Embedded Institutionalism: How can we enhance the "embeddedness" of international institutions in domestic society? Through partnerships with domestic government institutions? By creating channels for individuals and NGOs to bypass domestic governments and participate in these institutions directly? Or both?*

Scholars in both IR and IL are developing an approach that might be called "embedded Institutionalism": a focus on the domestic origins of international institutions and the domestic possibilities for enforcing international rules.<sup>154</sup> From this perspective, international institutions are but the tip of a vast iceberg of relationships, calculations, and processes of interest definition and identity formation below the surface of the state. Theories of institutional formation, duration and impact must thus analyze domestic, as well as international, politics and focus on the crucial interrelationship between the two levels. From the IL side, a wide range of possibilities exist for strengthening formal and informal links between international and domestic institutions in ways that blur the distinction between international and domestic law and hence make international law more enforceable.

A more concrete illustration of the possibilities raised by this agenda emerges from a growing awareness of courts as quasi-autonomous actors in the international system. A number of political scientists and EU legal scholars are examining the relationships between the European Court of Justice and national courts in various EU member states, analyzing the ways in which those relationships have been critical to the construction of the EU legal system.<sup>155</sup> They are following the lead of legal scholars such as Joseph Weiler and Hjalte Rasmussen, who first pointed to the role of national courts, but

<sup>153</sup> On the Basel Committee and IOSCO, see *supra* note 151.

<sup>154</sup> Cf. John Ruggie's theory of "embedded liberalism," *supra* note 98, an account of the construction of the postwar international trade regime that emphasizes domestic constraints on the formation and implementation of international rules.

<sup>155</sup> See Karen Alter, *The Making of a Rule of Law: The European Court of the National Judiciaries* (1996) (unpublished Ph.D. dissertation, Department of Political Science, Massachusetts Institute of Technology); Karen Alter, *Who Are the Masters of the Treaty? European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998); Jonathan Golub, *The Politics of Judicial Discretion: Rethinking the Interaction Between National Courts and the European Court of Justice*, 19 W. EUR. POL. (1996); Alec Stone Sweet & Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95*, J. EUR. PUB. POL'Y (forthcoming 1998); THE EUROPEAN COURTS AND NATIONAL COURTS: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne-Marie Slaughter, Alec Stone Sweet & Joseph H. H. Weiler eds., 1998); Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM. J. EUR. L. 229 (1997); G. F. Mancini, *The Role of the Supreme Courts at National and International Level: A Case Study of the Court of Justice of the European Communities*, paper presented at the International Association of Procedural Law (May 1997).

without systematically analyzing it.<sup>156</sup> Current doctrinal debates about the evolution of "Kompetenz/Kompetenz" are tracking ongoing power struggles between national courts and the ECJ that will have important implications for the next round of European integration.

Beyond the European Union, both national and international courts are attracting increased attention in terms of their actual or potential relationship with one another, either as partners in enforcing international rules<sup>157</sup> or as participants in a larger dynamic process of socialization in the service of compliance.<sup>158</sup> Similar relationships could be forged between administrative entities at the national and supranational levels, or even legislative committees. International lawyers need to explore the design and implementation of facilitative procedural mechanisms, such as the Article 177 procedure in the EU legal system, to create enduring links.

A final set of important and potentially fascinating questions concern the relationship between international institutions and government networks. More precisely, it is possible that domestic institutions will become more interested in and receptive to their counterpart international institutions as they begin to perform the same functions horizontally rather than vertically. For instance, domestic judges, at least in the United States, are beginning to articulate their responsibility to "help the world's legal systems work together, in harmony, rather than at cross purposes."<sup>159</sup> Such cooperation includes not only procedural mechanisms of deference and collaboration, but also substantive evaluation of the degree of convergence between domestic and foreign law. The U.S. court must assess the sufficiency of the rights and remedies afforded a litigant under foreign law as compared with U.S. law. In this calculus, "comparability" does not mean "equality" but, rather, a rough equivalence of ends often reached by different means.<sup>160</sup>

The result is the judicial development of the principle of "legitimate difference."<sup>161</sup> Such roles engage domestic courts in direct dialogue with foreign courts, in ways that may ultimately enhance their receptivity to partnerships with supranational courts and tribunals. Accepting the principle of legitimate difference could well dispose a particular domestic court to give weight to a decision arrived at by an international tribunal that had carefully canvassed multiple bodies of national law.

Embedded institutionalism extends beyond courts, of course. Another promising avenue for both theoretical research and practical prescription concerns the "nesting" of government networks within more traditional international institutions. Within NAFTA, for instance, networks of Canadian, American and Mexican environmental officials work together in self-described "enforcement networks."<sup>162</sup> Specialized governmental officials

<sup>156</sup> See Weiler, *supra* note 21; HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY OF JUDICIAL POLICY MAKING (1986).

<sup>157</sup> INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996); Helfer & Slaughter, *supra* note 21, at 370-73, 308-12. See also sources cited on the European Court of Justice and national courts, *supra* note 155.

<sup>158</sup> See Koh, *Transnational Process*, *supra* note 11.

<sup>159</sup> *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991). The quoted language is from Judge Breyer, who thus justified the court's decision to dismiss, on *forum non conveniens* grounds, a case brought by a U.S. plaintiff against a Canadian defendant in U.S. court. The court decided that the case would be better heard by a Canadian court, notwithstanding the contrary expressed view of the Securities and Exchange Commission, writing as an amicus.

<sup>160</sup> See, e.g., *Roby v. Corporation of Lloyds*, 996 F.2d 1353, 1363-65 (2d. Cir. 1993) (choosing to let a case proceed in England rather than the United States, notwithstanding significant differences in the mode and content of securities regulation under English law, on the premise that "the available [English] remedies are adequate" and "sufficient" to deter "British issuers from defrauding American investors").

<sup>161</sup> Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1919, 1946 (1992).

<sup>162</sup> Scott C. Fulton & Lawrence I. Sperling, *The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere*, 30 INT'L LAW. 111 (1996).

in particular agencies have long been seconded to international institutions; the difference here is the conscious creation of a forum for national government officials to come together in their national capacities but under the auspices of an international institution. The result may be less friction between national and international institutions and more integrated implementation of international rules and norms.

## V. CONCLUSION

IR and IL have rediscovered one another. A new generation of interdisciplinary scholarship has emerged, reacknowledging that the disciplines represent different faces of and perspectives on the same empirical and/or intersubjective phenomena. Outsiders might categorize them as dividing the study of the international system in terms of positive versus normative, politics versus law. Insiders in both disciplines reject such facile distinctions. The reasons for the periodic divergence and reconvergence of the two fields have had more to do with the internalization of external events such as the Cold War and its end and the externalization of the internal dynamics of theory building and purported paradigm shifting.

Regardless of mistakes past, and no doubt future, the wheel has come round again. Scholars in both disciplines should profit from the moment to develop a genuinely collaborative research agenda that will generate both practical and theoretical insights. Many international lawyers and international relations scholars are speaking the same language, or at least languages. They may not yet be speaking with one voice, nor should they be. But each side is finding something to say, in a deepening and mutually profitable conversation.

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Despite our best efforts, omissions of work that fits within the criteria outlined above are bound to occur. They are due to error or oversight rather than to any qualitative judgments.

For general overviews of the schools of IR theory and how they relate to international law, see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989), and Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205 (1993). For newcomers to international relations theory who are looking for more extended treatments of IR theory, we recommend the following sources as useful starting points.

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